No. 77-1506

In the Supreme Court of the United States

OCTOBER TERM, 1977

VINCENT C. ZAZZARA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1978. A petition for rehearing was denied on March 31, 1978 (Pet. App. B). The petition for a writ of certiorari was filed on April 20, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court impermissibly amended the indictment.

2. Whether petitioner's trial was barred by the Double Jeopardy Clause.

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted on one count of making a materially false statement in connection with a loan application to a federally insured bank, in violation of 18 U.S.C. 1014.[1] He was sentenced to one year's imprisonment. The Court of Appeals for the Ninth Circuit affirmed that disposition, and denied petitioner's motion for rehearing (Pet. Apps. A and B).

The evidence at trial showed that in November 1973 petitioner had stated, in connection with a loan application submitted to the Bank of America, that a corporate financial statement dated December 31, 1972, and a personal financial statement dated April 30, 1973, accurately represented his current financial position (Tr. 131-136, 153-154; Gov't Exs. 16, 17). Those financial statements, which were relied upon by the bank officer who reviewed them in connection with petitioner's loan application (Tr. 140-141), failed to disclose that petitioner had previously incurred several substantial loan obligations (Tr. 141-144).

ARGUMENT

1. Petitioner contends that the district court impermissibly amended the indictment. Petitioner was charged in an indictment which alleged that, on or about November 26, 1973, petitioner

[1]Petitioner was charged in a four-count indictment. Two counts of the indictment were subsequently stricken by the district court on the ground that they alleged offenses previously charged in an indictment that had been dismissed after jeopardy had attached (Tr. 32). A third count was dismissed on motion of the government in the interest of justice (Tr. 39).

> * * * knowingly made materially false statements upon and in connection with an application for a loan to the Bank of America, Atlantic-Brightwood Branch, Monterey Park, California * * * for the purpose of influencing the action of this bank to approve said loans as follows * * * The defendant submitted a financial statement in the name of 'C. Vincent & Co.," dated April 30, 1973, which financial statement failed to reflect three (3) outstanding financial obligations previously incurred by the defendant in the name of C. Vincent & Co. * * *.[2]

After opening argument, the Assistant United States Attorney moved to strike from the indictment as surplusage the phrase "dated April 30, 1973," which referred to petitioner's corporate financial statement.[3] Petitioner objected to that motion. Although the phrase in question was not stricken from the face of the indictment, the court omitted it when reading the indictment to the jury at the close of the trial (Tr. 42-43, 336). Petitioner now contends (Pet. 9-17) that this procedure improperly amended the indictment against him.

As the Ninth Circuit correctly noted in its opinion below (Pet. App. A-3 to A-4), it is now well settled that the rule of *Ex parte Bain*, 121 U.S. 1, permits changes in an indictment that are purely formal or merely delete surplusage. Such formal corrections, including the correction of typographical errors, do not infringe the

[2]The indictment's enumeration of the three concealed loan obligations is here omitted for the sake of brevity.

[3]The date that the Assistant United States Attorney moved to strike (appearing in paragraph b, Count 2 of the indictment) was the result of a clerical error. The correct date was December 31, 1972 (Tr. 131, 135).

right of the accused to be tried upon indictment of the grand jury. See *Russell* v. *United States*, 369 U.S. 749, 770 ("an indictment may not be amended except by resubmission to the grand jury, *unless the change is merely a matter of form*") (emphasis supplied); *Stewart* v. *United States*, 395 F. 2d 484, 487 (C.A. 8) ("We have no difficulty in holding that the amendment correcting the time of the offense in the indictment did not in any manner deprive defendant of his Fifth and Sixth Amendment rights") *United States* v. *Dawson*, 516 F. 2d 796, 800-803 (C.A. 9), certiorari denied, 423 U.S. 855; *United States* v. *Skelley*, 501 F. 2d 447, 453 (C.A. 7), certiorari denied, 419 U.S. 1051; *United States* v. *Neff*, 525 F. 2d 361, 363 (C.A. 8); *United States* v. *Abascal*, 564 F. 2d 821, 832 (C.A. 9), certiorari denied, No. 77-6071, April 3, 1978. See also Rule 52(a), Fed. R. Crim. P.

The deletion of the clerical error in the reference to the date of petitioner's corporate financial statement was wholly proper. As the Ninth Circuit noted, the terms of the indictment were drawn with "sufficient particularity * * * [so] that the erroneous date of the company statement recited in the original indictment was surplusage which could be stricken without violating any of [petitioner's] constitutional rights" (Pet. App. A-4). The deletion of the date in question, which could have been omitted from the indictment in the first place, did not cause any confusion to petitioner, since he was in possession of the corporate financial statement prior to trial and could readily determine from the text of the relevant paragraph of the indictment that it referred to the financial statement of "C. Vincent & Co." given to the Bank of America in November 1973.[4]

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[4]Cases relied upon by petitioner such as *Howard* v. *Daggett*, 526 F. 2d 1388 (C.A. 9), are not on point, since the changes in the indictments in those cases were substantive and not merely clerical. While the district court may not alter the substance of the indictment, it may correct typographical or formal errors. See 1 Wright, *Federal Practice and Procedure* §127, p. 273 (1969). The Ninth Circuit's application of that settled rule to the particular facts in this case was correct and raises no important or novel question of law warranting the attention of this Court.

2. Petitioner also contends that his failure to raise at trial the claim of double jeopardy as to Count 2 of the indictment should not operate as a bar to appellate review of that claim. To the contrary, however, as the court of appeals held (Pet. App. A-2 to A-3), the record here shows a specific, voluntary and knowing relinquishment of the double jeopardy claim in the district court.

A review of the circumstances surrounding petitioner's double jeopardy contention places it in proper perspective. An earlier, three count indictment against petitioner, also brought under 18 U.S.C. 1014, charged him with making false statements in applications for loans on August 15, 1973, and August 29, 1973, to the Crocker National Bank, and on August 23, 1974, to the Home Bank. That former indictment was dismissed by the government after a petit jury had been empaneled (Tr. 32; Clerk's Transcript 27-37). When the indictment in the instant case was thereafter returned, petitioner's counsel moved to dismiss Counts 1, 3 and 4 of the indictment on the ground that those counts alleged the same offenses charged in the former indictment. After discussing Count 3 during the hearing on counsel's motion, the court turned to the remaining counts of the indictment as follows (Tr. 23-24):

THE COURT: Count Two of the new indictment has to do with a Bank of America loan, no mention of which was made in the first indictment.

[PETITIONER'S COUNSEL]: That is absolutely correct, your Honor.

THE COURT: So what you are really saying is that you feel that Counts One and Four ought to be dismissed.

[PETITIONER'S COUNSEL]: That's right, your Honor.

In these circumstances, petitioner effectively waived any contention that his trial on Count 2 of the instant indictment would infringe the double jeopardy clause of the constitution. See Fed. R. Crim. P. 12(b) and (f); *Haddad* v. *United States*, 349 F. 2d 511, 513-514 (C.A. 9), certiorari denied, 382 U.S. 896; *United States* v. *Conley*, 503 F. 2d 520, 521 (C.A. 8) (" '[c]onstitutional immunity from double jeopardy is a personal right which if not affirmatively pleaded by the defendant at the time of trial will be regarded as waived' ").[5]

In addition, it is clear that petitioner's double jeopardy contention is without legal foundation. As the district court stated and defense counsel conceded before trial (Tr. 23-24), Count 2 of the instant indictment alleged a false statement on November 26, 1973, made to the Bank of America, an entirely different transaction from those

[5]Cases cited by petitioner such as *United States* v. *Anderson*, 514 F. 2d 583 (C.A. 7), are not on point, since they depend upon factual circumstances showing an intention on the part of the defendant not to waive the double jeopardy contention in the trial court.

that were charged in the earlier indictment. The petition for certiorari makes the same point (Pet. 6): "No formal objection was filed with respect to Count Two as that count apparently, on its face, alleged a new and different matter than that set forth in the previous three counts of the original indictment." Because Count 2 of the indictment, under which petitioner was convicted, alleged a new offense not charged in the former indictment, the issue of double jeopardy does not arise.

Petitioner further suggests (Pet. 21-25) that the government was "collaterally estopped" from introducing at trial certain evidence of prior similar acts described in the earlier indictment. As petitioner concedes (Pet. 21), however, this argument was not presented to the court of appeals. It should not be pursued in this Court for the first time. In all events, it is clear that the contention is groundless. Collateral estoppel arises only "when an issue of ultimate fact has once been determined by a valid and final judgment." *Ashe* v. *Swenson*, 397 U.S. 436, 443. The dismissal by the government of the original indictment against petitioner did not give rise to any estoppel against the government because no fact issue was litigated and determined adversely to the government.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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